No. 15,295

United States Court of Appeals

For the Ninth Circuit

PAUL MITCHELL,	*Appellant,*
vs.	
C. L. SNIPES,	*Appellee.*

BRIEF OF APPELLANT.

BELL, SANDERS & TALLMAN,
BAILEY E. BELL,
WILLIAM H. SANDERS,
JAMES K. TALLMAN,
Central Building, Anchorage, Alaska,
Attorneys for Appellant.

Subject Index

Table of Authorities Cited

Cases

Rules

Statutes

Texts

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JURISDICTION AND PLEADINGS.

A. Jurisdiction.

Jurisdiction of the District Court was invoked under the Act of June 6, 1900, Chapter 76, Section 4, 31 Statutes 322, as amended, 48 U.S.C.A., Sec. 101. The jurisdiction of the Court of Appeals rests on Section 1291, of the New Federal Judicial Code, and the Federal Rules of Civil Procedure.

The jurisdiction of the Court in general is not in issue. However, the authority of the particular judge, the Honorable Ben C. Connally from the Southern District of Texas, to sit in the District Court of the District of Alaska, is a question that is being raised very briefly on this appeal.

B. Pleadings.

This case was started by the filing of a complaint in the Justice Court for the Anchorage Precinct on April 27, 1956. A judgment was then entered on the 21st day of May, 1956, on the complaint. A Notice of Appeal, appealing to the District Court for the Third Judicial Division was then filed on May 26, 1956, and the appeal perfected. After the appeal was perfected, a Motion to Dismiss Appeal with a Notice of Motion, was filed on June 15, 1956, and, upon argument, a minute order granting motion to dismiss appeal was entered on June 22, 1956. A formal order dismissing appeal was signed on the 25th day of June, 1956, along with a formal judgment at the same time. A Motion to Set Aside the Judgment was filed on the 29th day of June, 1956, which motion was supported by affidavits, and an opposing affidavit was filed. After argument a minute order denying motion to set aside the judgment was entered on July 20, 1956. A notice of appeal to this Court was filed on the same day as the minute order.

STATEMENT OF THE CASE.

This case is here on appeal as a result of the District Court's dismissal of Appellant's case which had been appealed from the local Justice Court to the District Court. The District Court dismissed the case because Appellant had not offered testimony in the Justice Court.

The primary issue herein is simple and merely involves construction of the Alaskan Statute authorizing appeal from the Justice Court to the District Court. The facts leading up to the dismissal follow:

On April 27, 1956, the Appellee herein filed a suit in the Justice Court for the Anchorage Precinct, Anchorage, Alaska, against the Appellant for a certain sum of money allegedly due the Appellee. The Appellant appeared on the 17th day of May, 1956 (R. 21, 26) without an attorney, although he had tried to get one. (R. 26, 27.) The Appellant stated in his affidavit, in reference to his attorney who had previously been retained in this matter, that the attorney would not go into Court with Appellant without any witnesses so Appellant took his file from the attorney and went to Court alone. (R. 16.) The attorney involved, however, did state that the Appellant insisted on handling his own trial. (R. 30.) The Appellant asked for another postponement at this time for the reasons indicated in his own words:

> "I did not have a lawyer, had just been discharged from the doctor's care at 5:00 P.M. the previous day, and needed time to secure a court reporter, file a cross-complaint and subpoena witnesses."

The justice granted the continuance to May 21, 1956, the next business day of the Court, since the continuance was over one holiday, a Saturday and a Sunday. (R. 21.) The testimony of the plaintiff (Appellee herein) was given on the 17th day of May, and the plaintiff was cross-examined by the Appel-

lant. (R. 16.) The Appellant also offered some pictures to the Appellee for his examination which the Appellant had ordered on the day before. (R. 15.) The pictures were not admitted into evidence by the Court. (R. 16, 17.)

After the Court recessed, the Appellant attempted to contact attorneys Wilson & Wilson, Mr. Ray Plummer, Mr. Carl Hutton and Mr. Peter Kalamarides. (R. 17.) The Appellant was unsuccessful in contacting an attorney until noon on Monday, May 21, 1956, at which time he met Mr. Kalamarides and was informed that Mr. Kalamarides would take the case. (R. 17.) Mr. Kalamarides told Appellant to appear and asked for a postponement. The Appellant did appear in Justice Court, in accordance with Mr. Kalamarides' instructions, whereupon the Appellant informed the Court that he had obtained the services of Mr. Kalamarides and requested another continuance. (R. 18.) The Appellee's attorney opposed the continuance and argued that the thing for the Court to do was to award his client the full judgment and that Mitchell could then appeal the case if he wanted to. (R. 18, 19.) The Justice complied by awarding the judgment to the Appellee.

After the judgment was awarded to the Appellee, discussion was held concerning the appeal, and the amount of the bond for the appeal, which finally was set at Five Hundred Dollars ($500.00). (R. 19.)

That evening, May 21, 1956, the Appellant contacted Mr. Kalamarides. Mr. Kalamarides informed

Appellant that he would file an appeal. (R 6.) However, the appeal was finally perfected by the counsel representing Appellant herein. (R. 19.)

On June 15, 1956, the Appellee moved to dismiss the appeal by a motion that did not set forth the grounds therefor. (R. 7.) Seven days later, on June 22, 1956, a hearing was held on said motion at which time a minute order granting motion to dismiss appeal was entered by the Honorable Ben C. Connally, District Judge from the Southern District of Texas. (R. 8.) The formal order dismissing the appeal, and the judgment, were signed and entered on June 25, 1956, by the Honorable Ben C. Connally. This appeal followed.

SPECIFICATIONS OF ERROR.

I.

That the Court erred in granting Plaintiff's Motion to dismiss appeal for the reason that no findings of fact and conclusions of law were made by the Court and the Judgment appealed from herein is not based upon findings of fact and conclusions of law.

II.

That the Court erred in granting Plaintiff's Motion to dismiss appeal from the Justice Court for the reason that Defendant-Appellant is entitled to an appeal as a matter of law and that Defendant-Appellant's appeal was timely perfected from the Justice's Court to the District Court.

III.

That the Court erred in summarily dismissing Defendant-Appellant's appeal from the Justice's Court since said dismissal required the disposition of a genuine and material issue of fact.

IV.

That the District Court Judge herein was without jurisdiction in this matter.

ARGUMENT.

I.

THAT THE COURT ERRED IN GRANTING PLAINTIFF'S MOTION TO DISMISS APPEAL FOR THE REASON THAT NO FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE MADE BY THE COURT AND THE JUDGMENT APPEALED FROM HEREIN IS NOT BASED UPON FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Some question may be raised as to the proper rule under which this case should fall. It can be argued that the motion for dismissal of the appeal should be construed as falling under Rule 12 (b)(6), failure to state a claim upon which relief can be granted. It may also be construed as falling under Rule 56, summary judgment. If the decision falls under either Rule 12 (b) (6) or Rule 56, then no findings by the Court are necessary, by virtue of Rule 52(a). However, if this case falls under Rule 41 (b), then Findings of Fact and Conclusions of Law should have been filed. The pertinent part of Rule 41 (b) is quoted herewith:

> "(b) Involuntary Dismissal: Effect Thereof. . . . if the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits. . . ."

The dismissal herein was unquestionably involuntary since the dismissal has been resisted at all stages of the proceedings.

The above quoted Section of 41(b) appears clear enough, except with respect to its application to matters in the nature of the case at bar. That is, it does not specifically provide for the disposition of cases on appeal to the District Court from the Justice Court of Alaska. The problem, of course, is whether or not the rule when referring to "Judgment on the merits against the plaintiff" would also apply in the case of "Judgment on the merits against the appellant." The terminology of the parties in reference to the appeal from the Justice Court is indicated in Sec. 68-9-3, A.C.L.A. (1949):

> "The appeal is taken to the district court, and may be taken within thirty days from the date of the entry of the judgment. The party appealing is known as the *appellant* and the adverse party the *respondent,* but the title of the action is not thereby changed." (Emphasis ours.)

From the foregoing it can be seen that an involuntary dismissal is not against the "plaintiff" in the District Court but against the "appellant" in cases that are appealed from the Justice Court. The most reasonable interpretation that can be placed upon the meaning of 41(b) is that the drafters meant "a party seeking relief," when they referred to "plaintiff" and thus the rule would also apply to an Appellant from the Justice Court who was subjected to an involuntary dismissal. Any other construction would distort the application of this particular rule. It would result in a requirement of findings, in involuntary dismissals, when the plaintiff in the Justice Court appealed the case, but not when the defendant appealed. The drafters could hardly have intended such a strained result.

The judgment given in this case is clearly judgment on the merits (R. 10) and, in any event, is so defined by Rule 41(b) which states:

> ". . . and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

II.

THAT THE COURT ERRED IN GRANTING PLAINTIFF'S MOTION TO DISMISS APPEAL FROM THE JUSTICE COURT FOR THE REASON THAT DEFENDANT-APPELLANT IS ENTITLED TO AN APPEAL AS A MATTER OF LAW AND THAT DEFENDANT-APPELLANT'S APPEAL WAS TIMELY PERFECTED FROM THE JUSTICE'S COURT TO THE DISTRICT COURT.

This appeal is primarily concerned with the lower Court's interpretation of Sec. 68-9-1, A.C.L.A. (1949). This statute is quoted in full:

> "Right of Appeal. Either party may appeal from a judgment given in a justice's court, in a civil action, when the sum in controversy is not less than fifty dollars, or for the recovery of personal property of the value of not less than fifty dollars, exclusive of costs in either case, except when the sum is given by confession or for want of an answer, as prescribed in this chapter and not otherwise. (CLA 1913, Sec. 1827; CLA 1933, Sec. 5591.)

To be specific, the particular construction in issue is that concerning the clause "except when the sum is given by confession or for want of an answer."

The appellee's case appears to be based almost solely upon the 1902 Alaska case of *Everton v. Smith,* 1 Alaska 422, which essentially held, as the headnote of the case indicates:

> "The defendant filed a formal answer in the justice's court, but did not appear or offer any evidence on the day of trial. Upon the testimony of the plaintiff, and in the absence of the defendant, the justice rendered judgment for plaintiff. Defendant appealed, and upon a motion to

> dismiss the appeal in the District Court it was held that defendant's unexplained failure to appear at the trial was an abandonment of his answer, and that judgment was properly rendered against him, and that he had no absolute right of appeal to and trial in the Ditsrict Court. Appeal dismissed."

The facts in the *Everton* case, however, are different from the case at bar, for in the case at bar the Appellant did everything in his power to defend his case by attempting to get an attorney to represent him, and by personally appearing before the Justice Court at every stage of the proceedings and even attempting to handle his own case by cross-examining the plaintiff's witnesses and by tendering to the Court certain evidence in the form of photographs. Whereas, in the *Everton* case, the defendant failed to appear at the time of the hearing and did not even offer an excuse after entry of the judgment for such failure to appear. The Court indicated its opinion on that point at page 426 of the opinion as follows:

> "The court is justified in assuming, under such conditions, that the appellant has no excuse to offer for his failure to be present before the justice, but stands upon his bare right to have his case heard on the merits for the first time in this court. He has no such right under the law. * * *"

A case that is much more in point than the *Everton* case is an Alaskan case that was decided approximately ten (10) years after the *Everton* case, namely,

in 1912. This is *Johnson v. Johnston-Coutant Co.,* 4 Alaska 456. In this case the plaintiff sued defendant in the Justice Court and appeared at the time of the trial, by attorney, to request a continuance. The defendant filed an answer and demanded trial. The Court refused the plaintiff's continuance and after the defendant had waited an hour, judgment was rendered for the defendant. When the Court called the case for trial the plaintiff's attorney departed from the courtroom announcing that he would have nothing to do with the trial. After the judgment was rendered the plaintiff appealed to the District Court and the defendant subsequently moved to dismiss the appeal. The Court denied the motion to dismiss the appeal and stated at page 463 of the opinion:

> "The right of appeal is a substantial right granted to any dissatisfied litigant who feels himself aggrieved by the judgment, and, before a court should declare that a party has lost his right of appeal by conduct which is contended amounts to a voluntary nonsuit or a confession, the record should be such as to prevent any other reasonable conclusion than that the appellant had abandoned his cause before the justice, submitted to voluntary nonsuit, or confessed the judgment that was entered. The record in this case warrants the inference that the plaintiff, by applying for a continuance, did not consider himself able to go to trial at that time, and, although his showing for a continuance may have been entirely insufficient, yet the fact that he did appear and apply for a continuance warrants

> the conclusion that he did not intend to submit to a voluntary nonsuit or confess the judgment that was entered against him."

The situation in the case at bar is very similar except that the Appellant in the case at bar actually gave less indication of having abandoned his case than did the plaintiff in the *Johnson* case. In the *Johnson* case the attorney for the plaintiff left the courtroom and stated that he would have nothing further to do with the trial after he had moved for a continuance which was refused. But in the case at bar, the Appellant not only moved for a continuance so as to enable his attorney to prepare the case for him (R. 18), but actually stayed in the courtroom and cross-examined the plaintiff's witnesses and offered evidenec in the form of photographs. It is true that the evidence was not accepted, and it is probably true that the evidence in the form of photographs was not offered at the proper time. Nevertheless, the Appellant was doing everything possible to defend his case and at no time had ever inferred that he had abandoned the defense of his suit.

The Court in the *Johnson v. Johnston-Coutant Co.* case supports his determination by case authority from other jurisdictions at pages 461 and 462. However, the Court's own reasoning appears to be extremely sound when the Court indicated that it was not reasonable to assume that the plaintiff submitted to, or confessed, judgment, and the reasoning is clearly set forth on page 462 of the opinion as follows:

> "It may be said that, in the case at bar, plaintiff's counsel did not remain in the courtroom after the court overruled the motion for continuance and ordered the trial to proceed. He did, however, appear at the time set for trial and move for a continuance, which motion was denied. Is it not fair to infer, when nothing to the contrary appears, that the plaintiff considered himself unable to go to trial at that time; and while the court must assume that the ruling of the commissioner's court, in denying the motion for continuance, was correct, yet the fact that the motion was made indicates that the plaintiff did not desire to submit to a voluntary nonsuit or to confess judgment which was entered against him."

The uncontroverted affidavit of Appellant clearly indicates that he had tried to continue the case and was not abandoning his suit. With reference to the day upon which the Justice Court rendered judgment against the Appellant, the Appellant stated at page 18 of the Record:

> "I informed the court that I contacted Mr. Kalamarides, who advised me to ask for another postponement, until he could become familiar with the case. * * *"

Further on in the same page, the Appellant stated:

> "Mr. Atkinson told the Judge he would not allow a lawyer a third postponement and didn't see why a guy trying his own case should be allowed a third postponement. I then stated that I was not prepared to try the case, that I did not have a lawyer, nor witnesses; . . . I further stated

> emphatically that I did not intend to capitulate because I wanted the case to come to trial and if I should be defeated I would want to appeal the case, . . ."

Then, after this discussion, at page 19 of the Record, it was indicated that judgment was given against the Appellant as indicated.

> "The Judge agreed. The Judge asked me if I wanted to testify and I just simply said that I was not at all prepared for trial, and he pronounced the judgment against me, then asked if I wanted to give oral notice to appeal. * * *" (R 19.)

The Appellant's statements as to what happened are substantiated by the affidavit of the Justice who gave the original judgment in the Justice Court as follows:

> "That on May 21, 1956, Paul Mitchell appeared without an attorney and requested another continuance, which request was denied."

The Justice indicated that he did render judgment for the plaintiff, Appellee herein. (R. 22.)

It should be noted that although the grounds for the Appellee's motion to dismiss appeal were that the Appellant had abandoned his case in the Justice Court, no grounds appeared in the Appellee's motion. (R 7.) This directly conflicts with Rule 7(b) which states, in part:

> "(1) An application to the court for an order shall be by motion which, . . . shall state with particularity the grounds therefor. . . ."

Not one word concerning the grounds appears in the Motion, although the Appellee's position can probably be determined from the argument contained in the brief which the motion indicated was attached thereto. In any event, the Appellee did not strictly comply with the rule indicated. A discussion on this point is given in 1 Barron and Holtzoff, 405, 406:

> "A motion must specify with particularity the grounds upon which the motion is based and set forth the relief or order sought. These requirements are mandatory; compliance is essential to orderly procedure; and an order made on oral motion not in the course of hearing or trial is erroneous for want of notice."

The last cited authority contains footnotes supporting the statement as follows, at pages 405 and 406:

> "Motion to strike complaint because it did not state claim upon which relief could be granted was subject to dismissal. *Advertisers Exchange v. Bayless Drug Store,* D.C. N.J. 1943, 3 F.R.D. 178."
>
> "Rule 7 requiring motions to state with particularity the grounds therefor was not intended to be a matter of form, but was real and substantial. *Steingutt v. National City Bank of New York,* D.C. N.Y. 1941, 36 Fed. Supp."

With respect to the discussion above as to which rule this case falls under, it should also be observed that the Court and Appellee must have treated this case as not falling under Rule 56. This conclusion follows from the observation of Appellee's notice of

motion (R. 7) which indicates that the motion was noticed to be heard seven (7) days after it was filed and served. Under Rule 56(c), the motion would have to be served at least 10 days before the time fixed for the hearing. Here the motion was not only noticed to be heard seven days later, but actually was heard on June 22, 1956, which was exactly one (1) week after filing and service of the motion. (R. 8.)

In construing that part of 68-9-1, A.C.L.A. (1949) reading, "or for want of an answer," it should be borne in mind that a formal answer did not have to be filed in the Justice Court herein. The pertinent statute is Section 68-3-1, A.C.L.A. (1949), which is quoted herewith:

> "Formal Pleadings dispensed with: Time of filing instruments and statements. No formal pleadings on the part of either plaintiff or defendant shall be required in a justice's court; but before any process shall be issued in any action the plaintiff shall file with the justice the instrument sued on and a statement of the account as of the facts constituting the cause of action upon which the action is founded; and the defendant shall, before the trial is commenced, file the instrument, account, or statement of his setoff or counterclaim relied upon."

Thus, even though the Appellee did file a written complaint, it was not necessary that the defendant, Appellant herein, file a written answer.

Since formal written answers are not necessary in the Justice Court, it seems that the appearance of the Appellant alone would preclude this case from

falling under that particular category "for want of an answer." This also seems to be the construction of the Court in the *Everton v. Smith* case, 1 Alaska 422, where the defendant had filed a written answer but failed to appear at the time of the trial. The Court held that the failure to appear must be construed as the waiver of his answer and that, therefore, no appeal would lie. It was, therefore, the failure to appear at the time of the trial that was fatal in the *Everton* case.

It should be noted that the holding of the *Johnson* case as indicated by the headnote is incorrect, apparently due to typographical error. The holding of that case is, substantially, that where a litigant appears at the time of the trial in the Justice Court and moves for continuance, he has not abandoned his suit and a judgment rendered is not a judgment for want of an answer nor one by confession, and is, therefore, appealable.

In dismissing the Appellant's appeal, the District Court appears to have ignored another statute which should have some bearing on such appeals. This is Section 68-9-10, A.C.L.A. (1949):

> "When appeal perfected: Trial de novo. Upon the filing of the transcript with the clerk of the district court the appeal is perfected, and the action shall be deemed pending and for trial therein as if originally commenced in such court, and the district court shall proceed to hear, try, and determine the same anew, without regarding any error or other imperfection in the original summons and the service thereof, or on the trial,

judgment, or other proceeding of the justice or marshal in relation to the cause."

Since the appeal herein in the District Court had been perfected, the case should have been deemed pending and for trial as if it had originally been commenced in the District Court. It also appears that if there were any defects in the Justice Court proceeding, this statute would authorize the District Court to continue with the case and ignore such "error or other imperfections."

The arguments may be urged that Section 68-9-10 would be inconsistent with the exceptions indicated in Section 68-9-1. However, this is not necessarily so and Section 68-9-10 may be construed as requiring the objecting party to object under Section 68-9-1 before the appeal is perfected. Such a requirement would be equitable and just since it would require the objections to be taken before the Appellant had incurred the trouble and expense of paying for docket filing fees and undertaking on appeal. In the case at bar, the notice of appeal from the Justice Court was filed on the 25th day of May, 1956. However, the notice of the motion to dismiss appeal was not filed until June 15, 1956. If the Appellant were not entitled to an appeal to the District Court, then the Appellee should have given notice of objections before the appeal was perfected and the case ready for trial *de novo*.

III.

THAT THE COURT ERRED IN SUMMARILY DISMISSING DEFENDANT-APPELLANT'S APPEAL FROM THE JUSTICE'S COURT SINCE SAID DISMISSAL REQUIRED THE DISPOSITION OF A GENUINE AND MATERIAL ISSUE OF FACT.

As indicated above, the proceedings herein may have been treated as a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. No such terminology as "summary judgment" was used in any of the proceedings so it cannot be categorically stated that this case definitely falls under any particular rule. However, some such interpretation may follow under Rule 12b. This is discussed in 1 Barron and Holtzoff, 612-614. A footnote in the last citation at page 614 clearly indicates Barron and Holtzoff's discussion:

> "Under Rule 12(b), as amended, if a motion to dismiss is made for failure to state a claim upon which relief can be granted, and matters outside the pleading are presented to and not excluded by the court, the motion will be treated as one for summary judgment and disposed of as provided in Rule 56. American Mach. & Metals v. De Bothezat Impeller Co., D.C.N.Y. 1948, 8 F.R.D. 324."

The difficulty with finding that the case concerned a question of summary judgment is that none of the issues raised by the plaintiff's complaint were disposed of by the final judgment. No affidavits were offered to support the plaintiff's position on the merits and there is no evidence in the record to support a summary judgment. Presumably, if this case

fell under Rule 56, the pleadings, depositions, and admissions on file, together with the affidavits, if any, should show that there is no genuine issue with any material fact and that the moving party is entitled to a judgment as a matter of law. No such showing can be found.

IV.

THAT THE DISTRICT COURT JUDGE HEREIN WAS WITHOUT JURISDICTION IN THIS MATTER.

The minute order granting motion to dismiss appeal, the order dismissing appeal, and the judgment herein were all rendered by the Honorable Ben C. Connally, a regularly appointed District Judge from the Southern District of Texas, while sitting as a District Judge for the District Court of Alaska. There is no known legislative authority authorizing a District Court Judge from the Southern District of Texas to sit as a District Court Judge for the District of Alaska.

Since this question has been raised in the case of *Reynolds v. Lentz, et al.,* No. 15409, presently on appeal before this Court, the question is raised herein only briefly. This point is raised only on the assumption that it will have been determined in the *Reynolds v. Lentz* case by the time that this case is heard and it is, therefore, felt that it would be pointless to pursue the matter further than has been done herein.

CONCLUSION.

The District Court decision herein amounts to the holding that the Appellant had lost his right to appeal by allowing a judgment in the Justice Court to be entered, either through want of an answer or by confession. The result is the deprivation of a very substantial right on extremely nebulous grounds. It was error for the District Court to reach such a conclusion herein and the appeal from the Justice Court should not have been dismissed except where the record was such as to prevent any other reasonable conclusion than that the Appellant had abandoned his cause before the Justice, submitted to a voluntary nonsuit or confessed the judgment that was entered.

The Judgment of the Court below should be reversed.

Dated, Anchorage, Alaska,
February 13, 1957.

BELL, SANDERS & TALLMAN,
BAILEY E. BELL,
WILLIAM H. SANDERS,
JAMES K. TALLMAN,
Attorneys for Appellant.